APPEAL NO. 031176
FILED JUNE 20, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 7, 2003. The hearing officer decided (employer 1) was the appellant's (claimant) employer for the purposes of the 1989 Act at the time of the claimed injury, and that the respondent (carrier) did not waive the right to contest the claimed injury by not contesting the injury in accordance with the Section 409.021. The claimant appeals, and seeks reversal on evidentiary grounds. The carrier responds, and urges affirmance.

DECISION

Affirmed.

The identity of the employer was at issue in this case. It was undisputed that the claimant sustained injuries when he fell off of a ladder while painting.

The claimant seeks to use the Employer's First Report of injury or Illness (TWCC-1) offered into evidence as proof that the claimant was an employee of (employer 2). Section 409.005(f) provides that the TWCC-1 may not be considered an admission by or evidence against an employer or carrier where the facts are in dispute. Whether the claimant was an employee of employer 2 was at the very crux of the dispute. Consequently, we decline to consider the TWCC-1 as evidence that employer 2 was the claimant's employer on the date of the injury. S*ee* Texas Workers' Compensation Commission Appeal No. 011436, decided August 1, 2001.

The claimant additionally argues that he was a borrowed servant of employer 2. Texas courts have recognized that a general employee of one employer may become the borrowed servant of another employer. The determinative question then becomes which employer had the right of control of the details and manner in which the employee performed the necessary services. Carr v. Carroll Company, 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). The Texas law on this matter is succinctly stated in Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 at 269-270 (Tex. App.-Houston [1st Dist.] 1991, no writ), as follows:

> Under Texas Workers' Compensation Law, the entity with the "right to control" the employee at the time of the accident is the "employer" for workers' compensation purposes. [Citation omitted.] An employee in the general employment of one employer may be temporarily loaned to another so as to become a special or borrowed employee of the second employer. [Citation omitted.] Whether a person is an "employee" of the general employer or the special employer to whom he is loaned is determined by which employer had "control" of the "manner of performing

> [his] services." [Citation omitted.] Where one entity "borrows" another's employee, workers compensation law identifies one party as the "employer" and treats all others as third parties. [Citation omitted.] [*See* also Texas Workers' Compensation Commission Appeal No. 030146, decided February 26, 2003.]

In the present case, there was conflicting evidence on the issue of right of control. The hearing officer noted that employer 2 did not control when the claimant comes or goes, did not provide equipment, and did not tell the claimant how to do the job. Additionally, the hearing officer noted that there was no written contract or agreement between employer 2 and employer 1. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's determination that employer 2 was not the claimant's employer for purposes of the 1989 Act involved questions of fact for the hearing officer to resolve. *See* Texas Workers' Compensation Commission Appeal No. 013127, decided January 25, 2002; and Texas Workers' Compensation Commission Appeal No. 020608, decided May 1, 2002. The hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. Section 410.165(a). In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Coverage is a threshold requirement for establishing liability of a carrier. Texas Workers' Compensation Commission Appeal No. 022268-s, decided October 30, 2002; Texas Workers' Compensation Commission Appeal No. 960500, decided April 19, 1996. Where the claimant is determined not to be an employee of the insured on the date of injury, as in this case, the carrier cannot be held liable for the claimed injuries under the waiver provision of Section 409.021, as a matter of law. Appeal No. 022268-s, citing Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.) (holding that a carrier cannot waive into coverage for a person not employed by its insured on the date of injury for failing to observe the timely defense provisions of Section 409.021). Texas Workers' Compensation Commission Appeal No. 030746, decided May 7, 2003.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **REPUBLIC LLOYD'S INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MIKE DITTO
2727 TURTLE CREEK BOULEVARD
DALLAS, TEXAS 75219.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Gary L. Kilgore
Appeals Judge